

2006

# State of Utah v. Earl Lee Smith : Brief of Appellant

Utah Court of Appeals

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## Recommended Citation

Brief of Appellant, *Utah v. Smith*, No. 20060959 (Utah Court of Appeals, 2006).

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**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH,

Plaintiff/Appellant,

vs.

EARL LEE SMITH,

Defendant/Appellee.

Case No. 20060959-CA

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**BRIEF OF APPELLANT**

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APPEAL FROM THIRD JUDICIAL COURT, SALT LAKE COUNTY,  
STATE OF UTAH, FROM A CONVICTION OF ASSAULT, A CLASS B  
MISDEMEANOR, BEFORE THE HONORABLE TERRY L. CHRISTIANSEN.

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FILED  
UTAH APPELLATE COURT  
JUN 15 2007

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**BRIEF OF APPELLANT**

**STATEMENT OF JURISDICTION**

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(e) (Supp. 2001).

**ISSUES PRESENTED AND STANDARDS OF REVIEW**

1. Whether the trial court should have allowed Dr. Beall, a mental health expert, to testify as to Smith's mental health diagnosis and the effect it had on Smith's reaction to comments made about his deceased son, and hence the reasonableness of Smith's actions as it relates to the charge of assault. This issue was preserved for trial by Smith's attempt to introduce the testimony of Dr. Beall at trial (R. 231 at 136-138).
2. "The trial court has wide discretion" to determine the admissibility of expert testimony evidence. *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993). Thus, a trial court's decision to admit or exclude expert testimony is reviewed under an

abuse of discretion standard. *State v. Maestas*, 63 P.3d 621, 625 (Utah 2002). No court will “reverse a decision to admit or exclude expert testimony unless the decision exceeds ‘the limits of reasonability.’” *Id.* (quoting *State v. Hollen*, 44 P.3d 794, 803 (Utah 2002)).

## **CONTROLLING STATUTORY PROVISIONS**

Any controlling statutory provisions and rules are set forth in the Addenda.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

Smith appeals from the judgment, sentence and commitment of the Third District Court after being convicted by a jury for assault, a class B misdemeanor.

### **B. Trial Court Proceedings and Disposition**

Smith was charged by information on March 2, 2005, of assault on a correctional officer, Class A Misdemeanor; assault; Class B Misdemeanor; criminal trespass, Class C Misdemeanor; and disorderly conduct, Class C Misdemeanor (R. 1). On March 18, 2005, Smith entered not guilty pleas to all counts (R. 7, 8).

After several pre-trials, a jury trial was set for August 22, 2006 (R. 64, 65, 71, 72, 75, 76, 79, 80, 83, 84). A jury trial was held on August 22, 2006, after which Smith was found guilty of all charges (R. 191, 193-197). On October 10, 2006, Smith was sentenced to a term of 365 days on Count 1, assault on a correctional officer; to 180 days on Count 2, simple assault; and to 90 days each on the Counts 3 and 4, criminal trespass and disorderly conduct (R. 205-208). All of the jail time was suspended and Smith was

placed on probation to be supervised by AP&P for 18 months with standard probation conditions and a fine of \$600.00 (R. 205-208). A notice of appeal was filed on October 12, 2006 (R. 210-211).

## **STATEMENT OF RELEVANT FACTS**

### **TESTIMONY OF MARCO GUERRERO**

On the evening of February 25, 2005, Marco Guerrero was at the Filling Station in Magna, Utah (R. 231 at 61). On that evening Guerrero interacted with Defendant Smith (R. 231 at 62). Guerrero testified that Smith during open mic. night at the club was *saying things about Hispanics and about Magna and that he kept repeating it and that* Guerrero basically told him to shut his mouth in response (R. 231 at 62, 63). Guerrero stated that they then got into a shoving match which he stated that Smith initiated (R. 231 at 63). At that point security broke it up and sent Smith on his way (R. 231 at 63). Guerrero stated that about 45 minutes to an hour later Smith came back to the club and had a second interaction with him (R. 231 at 63, 64). Guerrero stated that he was sitting by the entrance on the bar drinking his beer that he really didn't see Smith when he came in, and that Smith blindsided him and that by the time Guerrero turned back around security had him again and that Smith punched him (R. 231 at 64). Security took Smith to the floor which was the first time Guerrero actually saw him (R. 231 at 64). Guerrero was struck in the jaw and that it hurt (R. 231 at 64).

During cross-examination Guerrero admitted that he had drank about six beers that evening (R. 231 at 65, 66). Guerrero stated that Smith sang a karaoke song and that after



the song he was making some kind of political statements about Magna (R. 231 at 66). Guerrero didn't recall Smith talking about the death of his son but did recall him making comments about Magna and Hispanics and that he reacted to that (R. 231 at 66, 67). Guerrero didn't approach security to address the offensive remarks supposedly said by Smith instead he went right up to him and told Smith to shut his mouth (R. 231 at 67). Guerrero admitted that the comment was hostile and that he was hot and that he was upset at what Smith was saying (R. 231 at 68). Guerrero denied having said anything to Smith about his son (R. 231 at 68). Guerrero stated that his hands were not raised or did he use any other body language and that he confronted Smith by himself (R. 231 at 69). Guerrero stated that Smith said something back to him and that he didn't remember what it was and then Smith pushed him so he pushed him back and he got into a shoving match (R. 231 at 69). Security then came and broke it up (R. 231 at 70).

Guerrero had identified defense Exhibit 1 as the security guard that broke the fight up (R. 231 at 71). Guerrero didn't remember if it was more than one guard that broke off the fight (R. 231 at 72). After the fight was broken up Guerrero went on his way, went back and finished his beer (R. 231 at 72). Guerrero didn't know if anyone got scratched because after they were split up Smith was still arguing with the security guard and he didn't know what went on because he was told to go sit down before he got kicked out (R. 231 at 72). Guerrero didn't recall seeing a necklace or a locket on the ground that was torn off from Smith (R. 231 at 72). Guerrero stated that Smith came back approximately 45 minutes later and that he believes that Smith struck him in the head although he repeated that he did not see who struck him in the head (R. 231 at 73-75).

Guerrero said that he was then dragged off to one side after he got hit and put him in the back room and didn't see anything after that until he got a ride home from a buddy of his (R. 231 at 75). Guerrero was not questioned at the bar or arrested on that occasion (R. 231 at 75, 76).

#### TESTIMONY OF BRIAN JONES

On the evening of the 24<sup>th</sup> and early morning hours of the 25<sup>th</sup> of February 2005, Jones was working as security at the Filling Station in Magna (R. 231 at 81, 82). As part of his duties Jones had been checking the bathroom and the game room where he heard a lot of noise and so he was listening closer from there and started walking out (R. 231 at 82). Jones heard, "A bunch of fuckin' this and fuckin' spicks and, you know." (R. 231 at 82). Jones came around the corner and by that time Guerrero came up on the stage and he and Smith started tussling (R. 231 at 82). Jones got between the two of them and separated them out to arms length (R. 231 at 83). Jones turned to Guerrero and told him to knock it off and just as he was getting ready to turn over and talk to Smith he saw a punch coming his way and as he turned it hit him (R. 231 at 83). Jones identified Smith as the one who hit him (R. 231 at 83, 84).

Jones identified state's Exhibit 1 which showed the left side of his face as being consistent with the injury he received from the punch by Smith (R. 231 at 84). After Jones was struck by Smith he wasn't sure what he did next because it put him into a bit of a blind rage (R. 231 at 85). He had come to his senses and had Smith pinned against the wall but he wasn't sure if he just pushed him back up against the wall between the cigarette machine and the ATM in a control type of hold (R. 231 at 85). After that

Smith's girlfriend came up and started being combative and that is when the other security guards who were working that night came and escorted Smith out of the bar (R. 231 at 86).

Later in the evening before last call Smith came into the bar again and Jones observed him strike Guerrero in the back of the head (R. 231 at 86). When Jones saw Smith enter the bar he headed over there and by the time he got there another security officer had taken Smith to the ground, Jones jumped on top of him to help gain control (R. 231 at 87). Jones was on the ground on top of Smith with the other security guard and didn't know how many people were on top of him because it was a big pile (R. 231 at 87). After that security unloaded the pile and shoved Smith out the door (R. 231 at 87, 88). Jones stated that they told Smith to never come back again and that Smith reacted by yelling profanities and threatening to kill them and cut their throats and shoot them which Jones stated was the usual thing that happens when people are thrown out of the bar (R. 231 at 88). Jones said the police were then called (R. 231 at 88).

Jones says so far that he was familiar with there is security equipment at the bar and that there are areas that the cameras don't catch (R. 231 at 88). Jones stated that part of the dance floor isn't reached by the security cameras and that the first interaction between Smith and Guerrero occurred close to that area (R. 231 at 88).

During cross examination Jones testified that he saw Smith and Guerrero in a tussle that each had each other by the clothes, fighting, but that he didn't actually see him throw any punches and thought they were about to fight (R. 231 at 89). Jones didn't ever hear anyone say, "You talking to us Earl?" "Yeah, we killed your son?" but that he

wouldn't have heard it if it was spoken at a normal voice because only Smith had a microphone that would amplify his voice (R. 231 at 89, 90). Jones repeated that he separated Smith and Guerrero physically, told them to knock it off and that he went into a blind rage and pinned Smith against the wall with his forearm (R. 231 at 90). Jones acknowledged that the time of the incident that he was about 285 pounds and that he is 6 foot 5 inches tall, Jones recalled that they found a broken necklace or locket and that Smith was asking about it the first time he was being thrown out (R. 231 at 91, 92). Jones stated that Smith said something about a chain falling off on the ground (R. 231 at 92). Jones gave the gold chain he found to one of the owners of the bar (R. 231 at 93).

#### TESTIMONY OF DARREN LEWIS

On the evening of February 24 and the early morning hours of the February 25, 2005, Darren Lewis was at the Filling Station, a club he owns (R. 231 at 96). Lewis testified that Smith, a patron who came in the club once in a while was there on that evening (R. 231 at 97). Smith caught Lewis' attention when he was up on the karaoke machine singing when he heard a lot of racial slurs being said (R. 231 at 97, 98). Lewis peeked his head out looked around the corner and saw a scuffle going on (R. 231 at 98). Lewis testified that Guerrero and Smith were involved in a scuffle and that security was up there at that time (R. 231 at 98). Jones was the security officer breaking it up (R. 231 at 98). Lewis testified that with security that big he just stays out of it and that he stayed behind the bar, that Smith was escorted out and he went back to doing the stuff he had to get done (R. 231 at 98). Lewis testified that he was present when Smith came back to the bar (R. 231 at 98, 99). He heard the door swing open because it hit the wall and he

looked up and he saw Smith coming in, Smith struck Guerrero in the back of the head from behind (R. 231 at 99). Security then jumped and took him out (R. 231 at 99).

Lewis stated that he is familiar with the surveillance system but not as well as the other owner Elliott (R. 231 at 99). He stated that there was certain areas that the cameras don't see (R. 231 at 99, 100).

During cross examination Lewis acknowledged that there were two videos of the incident that happened labeled an Earl 1 and an Earl 2 (R. 231 at 100). Lewis explained that Earl 1 is a 30 minute video of the same thing and that Earl 2 was a shortened down video of the same thing and that it was shortened because the file was too big to send (R. 231 at 100).

Lewis didn't hear anyone say, "You talkin' to us, Earl?" "Yeah, we killed your son"? (R. 231 at 101). He didn't hear anything about Earl's son at all (R. 231 at 101). Lewis said that he heard Guerrero screaming things such as why are you calling me a spick? etc. (R. 231 at 101). Lewis didn't see any punches but by the time he poked his out the door and looked around security and everybody was already there, Lewis did not see Smith hit Jones but saw everybody kind of fighting, a big group of people going at each other (R. 231 at 102). Lewis didn't recall any discussion about a locket or one being found (R. 231 at 103). Lewis stated that when Smith came back and punched Guerrero that it was captured on video (R. 231 at 103). Lewis didn't remember if anyone kicked Smith or of anyone hitting Smith after he was thrown to the ground but that Smith's girlfriend came in and was throwing punches (R. 231 at 104).

During redirect examination Lewis stated that it's dark in the bar that the stage has only got neon lights at night (R. 231 at 105). Lewis also acknowledged that when he saw the first incident Smith and Guerrero had already been separated (R. 231 at 105, 106).

#### TESTIMONY OF THOMAS ELLIOTT PERFILI

Thomas Elliot Perfili was at his business, the Filling Station, during the late evening hours of February 24 and the early morning hours of February 25, 2005 (R. 231 at 107). Perfili testified that he heard someone rapping that night during karaoke and that after that he heard some arguing so he proceeded to go upstairs to see what was going on (R. 231 at 108). As he got up the stairs, there was some verbal altercation going on, nothing physical just a verbal altercation and one of the security guards was trying to maintain the peace to keep in between the two parties (R. 231 at 108). Perfili stated that security was standing what would have been off the side of Smith and Guerrero but still in between them (R. 231 at 109). Perfili observed arguing going on between Smith and Guerrero (R. 231 at 109). He was about 20 feet away from the individuals and the lighting was dim but not dark (R. 231 at 109). Perfili did not observe any physical altercation (R. 231 at 110). After that, Perfili escorted Smith out the front door (R. 231 at 111). He told him that he wasn't welcome to come back (R. 231 at 112).

Perfili wasn't present when Smith came back but he heard another security guard say something to him, he came out of the office and at that time observed a physical altercation going on at the front bar with Smith toward the back of Guerrero kind of scuffling around (R. 231 at 112). Perfili grabbed Smith off of Guerrero's back and fell to the floor (R. 231 at 112). Quite a few other patrons came towards them and he was just

trying to keep everyone off of Smith as the other patrons had seen what Smith had done to Guerrero (R. 231 at 112, 113). Perfili was trying to get Smith restrained because he was still attempting to go after Guerrero but at the same time was trying to keep some of the other patrons from going after Smith because he had punched Guerrero, Perfili put Smith in basically what would be considered a full Nelson, lifted him off the ground with his arms above his head and took him out the front door (R. 231 at 113). At that time Smith was still belligerent towards Perfili and other people that were in the club, didn't calm down much and made threatening remarks and that's when Perfili decided to call the county sheriff (R. 231 at 113, 114).

Perfili knows how to operate the surveillance equipment at the club (R. 231 at 114). There are specific areas where there are obstructions but for the most part the majority of the space is covered through surveillance (R. 231 at 114). Perfili retained some footage from that evening on their server (R. 231 at 114, 115). Perfili explained that the video admitted into evidence was labeled Earl 2 because he had created two copies and that there were two different copies of the same altercations, one that was approximately 10 minutes long and one that was approximately 25 minutes long (R. 231 at 117). The one that was 25 minutes long was of the same cameras view but just had a lot of nothing on there as far as the altercation goes with people dancing, mingling, and walking through the bar, and was just an extended version of that evening (R. 231 at 117). The one that was labeled just Earl is the more condensed version of that time period for when the altercation happened to when they got Smith out of the club (R. 231 at 117). Perfili observed that there was one verbal altercation involving Smith and one

physical altercation involving Smith (R. 231 at 117). Of the two incidents involving Smith there is only footage of the second one and no footage of the first one because as Perfili went back and reviewed the video there was no physical altercation so a recording was not made of it (R. 231 at 118). Perfili explained that when he observed the first incident on the video surveillance system that he was unable to see any physical altercation (R. 231 at 118).

Perfili further explained that the first altercation happened on the stage close to the dance floor where there was surveillance coverage but it moved to an area of the bar where there is less coverage but you could still see people verbally having an argument and again stated that there was no physical type of altercation in that area (R. 231 at 118, 119). He stated that would be similar to peripheral vision where the camera can only see so much, you can see some movement in the area, people walking around making adjustment, but there was no outstanding physical altercation because it is very obvious when there is a physical altercation the bodies “just move, they move, you know”, “they don’t just move naturally, in a normal motion, they get moved quickly” (R. 231 at 119). So for the altercation that was in what was called the dead zone you can see people moving around, you can catch faces, you could recognize the people that were involved, but as far as obvious physical activity that you would see in an altercation, none of it was there (R. 231 at 120). There was no part of the first initial incident where there were any objects blocking the cameras ability to record (R. 231 at 120).

Again, Perfili chose not to record the first incident because all it showed was a verbal altercation going on between people and people moving around naturally, but not



physical activity going on (R. 231 at 121). Perfili further explained that they would not be able to go back to the club and obtain a copy of the first initial incident because it was a DVR recorder and only maintains a certain amount of hours of recording and then it starts rewriting to the hard drive “so if we didn’t make a copy of something right away within 3 to 6 days it’s recorded over” (R. 231 at 121).

During cross examination Perfili stated that when he originally heard the verbal argument he walked over to the camera system to see if it was an argument or just getting loud and it was very obvious that there was an argument right on the stage that was just a verbal argument (R. 231 at 123). Perfili said that at that time Smith and Guerrero were standing on the stage arguing back and forth that he didn’t hear anybody say, “You talking to us, Earl?”, “Yeah, we killed your son,” but heard a bunch of racially charged comments from Smith (R. 231 at 123). Perfili then went upstairs, observed the security guard in between Smith and Guerrero they had stepped off the stage and security was maintaining space in between the two (R. 231 at 124). Perfili then again stated that there was sufficient lighting to see the events, that he saw no punches being thrown and never saw Smith hit a security guard (R. 231 at 124, 125). Perfili didn’t hear Smith ask about any locket when he came back a second time but noted that Smith had dropped a chain when he entered and that Perfili personally went and picked it up (R. 231 at 126).

During redirect examination video footage of the incident was showed with Perfili explaining the different camera angles and areas of the bar (R. 231 at 128-134).

In response to the question of the judge provided by a juror that whether or not during the tape of the first altercation you could see all three of the parties Smith,

Guerrero, and Jones the entire time, Perfili answered that no you couldn't, that you could see portions of their bodies maybe not 100% complete but could see them come in and out of view but that the movement was normal, not drastic movement (R. 231 at 148, 149). In response to another question of whether on the tape you could see when Jones had Smith up against a wall or cigarette machine Perfili stated no, that the view was obstructed, that there was portions that you could see them coming in and out of view, but there is no obvious movement and that it was all natural body movement (R. 231 at 149).

#### TESTIMONY OF MIGUEL MIRANDA

Miguel Miranda is a deputy at the Salt Lake County Sheriff's Office and has worked there for four years (R. 231 at 139). He was on duty on the late evening of February 24 and early morning hours of February 25, 2005, and went to an opportunity to go to the Filling Station when he got a call that a fight was in progress there (R. 231 at 139). When they arrived they saw some people outside and checked for any injuries and started taking witness statement to figure out what happened and who was involved (R. 231 at 139, 140). Miranda talked to several people there and after those conversations he wrote down the names and was informed that there was a video surveillance of the incident that occurred which he viewed, based on witness statement and the video he viewed Miranda thought it was a good idea to locate Smith and speak to him (R. 231 at 141, 142).

Miranda went to where Smith lived at the time and located Smith walking in the parking lot of the condos and approached him to speak to him (R. 231 at 142). Smith

appeared agitated and angry stated that he had been over to the Filling Station, that he had been involved in an incident over there and when asked if he had been in a fight he stated that he didn't start anything that the reason the fight started was somebody had said something improper about his son dying (R. 231 at 142). Miranda felt that there was enough probable cause to arrest Smith and did so (R. 231 at 142, 143). Miranda placed Smith in handcuffs, put him in his car and started proceeding to towards the county jail. Miranda stated that on the way Smith started making comments hinting that police always picked on him that it was a racial thing (R. 231 at 143).

They eventually arrived at the jail and while parked Miranda started writing down the information he needed to so he could log things in the jail's computer and at that time Smith appeared to get very agitated and asked why it was taking so long to get inside the jail (R. 231 at 143). Miranda explained that he had to write things down and at that time Smith cleared his throat, leaned up in the seat, turned around and spit right towards Miranda's face and most of the spit landed on his shirt and his microphone that goes to his hand held (R. 231 at 143). After that, Miranda proceeded to get out of the car and took him into the jail, Miranda stated that Smith wasn't speaking to him when the spit or phlegm came out or at least he wasn't speaking to him where saliva or anything would be coming out as he was speaking to him aggressively or anything, but Smith basically leaned up with his handcuffs over towards him and Miranda told him that that was another charge he was going to add, assault on a correctional officer (R. 231 at 144). Smith responded that it doesn't matter because no one was going to believe Miranda (R. 231 at 144).

Miranda stated the bar didn't have any image of the actual altercation of the first incident or anything like that and that you couldn't see that part of the area where it happened because the camera was not pointed toward the stage area (R. 231 at 145).

#### TESTIMONY PETRA ROLFSON

Rolfson, person familiar with Smith, was at the Filling Station on the night of February 24 and early morning of February 25, 2005 (R. 231 at 151). She was there with Smith and it was karaoke night (R. 231 at 151). In the restroom she could hear Smith's voice rapping and when she came out she saw Guerrero approaching Smith (R. 231 at 152). It was crowded, but when they had moved, she saw Guerrero lean forward and take swings at Smith (R. 231 at 152). Smith went down (R. 231 at 153). Rolfson recognized the person in Defendant's Exhibit 1 as the person that was pushing Smith saying "you guys need to leave, you need to leave" (R. 231 at 154).

Rolfson testified that Smith carries the locket around his neck 24 hours a day and never takes it off (R. 231 at 155). When Smith went back to his home and felt his neck he started to cry and kind of get out of touch because he just wanted his locket back (R. 231 at 155). Rolfson accompanied Smith back to the Filling Station to retrieve the locket (R. 231 at 155). Smith went in the door to the bar ahead of Rolfson and when she went in she saw him on the ground being punched and kicked and she jumped in, started to try to pull people off of him because of his injuries (R. 231 at 156, 157).

During cross-examination Rolfson acknowledged on the date in question that she and Smith had just started dating (R. 231 at 164). Now she is his fiancé (R. 231 at 164).

## TESTIMONY OF EARL SMITH

Smith was at the Filling Station on February 25, 2005, for open mic. night or karaoke night (R. 231 at 165). Smith started off rapping about his son and was just free-style rapping (R. 231 at 166, 167). Guerrero approached him in the middle of his rap, came up like he was going to hug him and then all of a sudden said, "You talkin' to us? Yeah, we killed your son." (R. 231 at 167). Guerrero hit Smith with a right, left, another right, another left and then an uppercut and when he hit him with the uppercut, he almost fell down but didn't all the way (R. 231 at 167). As he was standing back up, he started swinging to protect himself and he didn't know who he hit because he had been hit five times and he thought he hit somebody, but he wasn't sure who (R. 231 at 168). After that, Smith exited the Filling Station and went home (R. 231 at 169). Smith has a locket he wears around his neck of his son that got killed that he never takes off (R. 231 at 169). He had it on that day when he got to the bar and at some point while at home, he noticed the necklace was gone (R. 231 at 169, 170). He told everyone that he dropped his chain down there, that he calls his "Buddha necklace" a nickname for his son that died (R. 231 at 170). Smith went back to the Filling Station to retrieve the necklace (R. 231 at 170, 171). When he walked in the Filling Station to get his necklace, he saw Guerrero and he thought about what he said in his ear and he snapped (R. 231 at 171). Then he got jumped from behind and his arms were stretched out and somebody had his legs (R. 231 at 171). Smith acknowledged that he hit Guerrero but then he got tackled and held down and said he was beat for probably 3-5 minutes and kicked in the head probably about 30 times, so hard that when he got to the jail, he went blind (R. 231 at 171).

After that, he went back home (R. 231 at 172). At some point, officer arrived and he was handcuffed (R. 231 at 172). He told the officer that Guerrero had killed his son (R. 231 at 173). Then they arrested him (R. 231 at 173). He was taken in a police vehicle by officer Miranda (R. 231 at 173). Smith told Miranda that he wanted to go back to the Filling Station to make a citizen's arrest on Guerrero and Miranda told him no and that's when Smith snapped again and started screaming and it's like he blacked out (R. 231 at 173). Smith stated it's like he blacks out and has no control and that is why he wanted his psychologist at the trial (R. 231 at 173, 174). Smith stated that he never spit on Miranda that he could remember. Smith admitted that he went crazy because he was being arrested and Guerrero was not being arrested and the chain of his son was missing and that he was on ten different medications (R. 231 at 174).

### **SUMMARY OF ARGUMENT**

Expert witnesses are to "assist the trier of fact to understand the evidence." Utah Evidence Rule 702. The trial judge is to weigh the probativeness of any expert testimony prior to its admission. *State v. Rimmasch*, 775 P.2d 388, 398, n.8 (Utah 1989). A trial court's decision to admit or exclude expert testimony will only be reversed if the trial court abused its discretion. *State v. Maestas*, 63 P.3d 621, 625 (Utah 2002).

The trial court abused its discretion because it refused to undertake any inquiry as to the probativeness of Dr. Beall's psychological expert testimony regarding Smith's state of mind on the night he was charged with assault. Further, the trial court usurped the jury's fact finding responsibilities.

## ARGUMENT

### **THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO ALLOW DR. BEALL TO TESTIFY ABOUT SMITH'S MENTAL HEALTH CONDITION AND THE EFFECT IT HAD ON HIS REACTION TO COMMENTS MADE ABOUT HIS DECEASED SON.**

Rule 702 of the Utah Rules of Evidence states that

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702 requires that a trial judge decide, “prior to the admission of any expert evidence ... whether, ‘on balance, the evidence will be helpful to the finder of fact.’” *State v.*

*Larsen*, 865 P.2d 1355, 1361 (Utah 1993) (quoting *Rimmasch*, 775 P.2d at 398, n.8).

This inquiry requires that the trial court “balance the probativeness of the proffered evidence against the dangers its admission poses.” *Rimmasch*, 775 P.2d at 398, n.8; *see* Utah Evidence Rule 402, 403.

“The trial court has wide discretion” to determine the admissibility of expert testimony evidence. *Larsen*, 865 P.2d at 1361. Thus, a trial court’s decision to admit or exclude expert testimony is reviewed under an abuse of discretion standard. *State v. Maestas*, 63 P.3d at 625. No court will “reverse a decision to admit or exclude expert testimony unless the decision exceeds ‘the limits of reasonability.’” *Id.* (quoting *State v. Hollen*, 44 P.3d 794, 803 (Utah 2002)). However, to determine these limits of reasonability, the trial courts decision must be placed “in its proper context.” *Hollen*, 44, P.3d at 803.

The trial court abused its discretion by not allowing Smith to introduce testimony from his psychiatrist, Dr. Larry Beall. First, the trial court did not undertake a probativeness inquiry regarding the expert testimony evidence. Second, the trial court abused its discretion when it took power away from the factfinder and decided, without hearing any of Dr. Beall's credentials, any of his experience with Smith, or any of his actual testimony, that Dr. Beall's statements were mere speculation.

In *Maestas*, the Utah Supreme Court held that the trial court had abused its discretion by not allowing an expert witness testify regarding the trustworthiness of eyewitness testimony. 63 P.3d at 626. The Supreme Court found an abuse of discretion because "the trial court ... did not allow an expert on eyewitness testimony to testify at all." *Id.* at 625. The trial court excluded both general expert evidence regarding the reliability of eyewitness testimony as well as expert testimony regarding the specific factors in the *Maestas* case that "could influence the accuracy of an eyewitness." *Id.* at 626. The Supreme Court determined that this evidence was probative because the State's case rested "almost exclusively on eyewitness testimony." *Id.*

When Smith requested that Dr. Beall be allowed to testify, the trial court did not undertake the probativeness inquiry as required by Utah Evidence Rule 402 and 403, which state, in pertinent part, that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the State of Utah, statute, or by these rules" and "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue



delay, waste of time, or needless presentation of cumulative evidence.” The trial court asked Smith what he anticipated Dr. Beall would state in his testimony. After Smith stated that Dr. Beall would testify as to “Smith’s state of mind, or possible state of mind, when Mr. Guerrero made a statement about his son,” R. 231 at 137, the trial court did not consider the probative value of either of those two pieces of evidence. Rather, the trial court simply dismissed the testimony as speculative. R. 231 at 138.

Dr. Beall’s anticipated testimony would have been probative. Dr. Beall was the only independent witness that could explain to the jury Smith’s true psychological state when faced with comments regarding his dead son. Dr. Beall indicated what he would have stated during Smith’s trial at Smith’s sentencing hearing. Dr. Beall, director of the Trauma Treatment Center, would have testified that he had worked with Earl since fairly soon after the incident in which his son was killed, and that he had diagnosed him with post traumatic stress disorder which includes intrusive symptoms where he has flashbacks of the incident, nightmares, anxiety and depression as well as physical symptoms (R. 232 at 67). Regarding the comments that Smith claimed Mr. Guerrero made about Smith’s son, specifically the comment “You talkin’ to us? Yeah, we killed your son” (R. 231 at 167), Dr. Beall could have testified that “[i]f that was said, the reaction would be predictably extreme because of the grief and the trauma he has been under and continues to have the symptoms for.” R. 232 at 68.

The jury, as the finder of fact, should have been permitted to weigh this psychological information when deciding whether or not Smith assaulted Mr. Jones . The jury, as factfinder, was already charged with deciding whether or not to believe that

Mr. Guerrero had made a comment regarding Mr. Smith's son. If the jury chose to believe Mr. Smith, then a thorough understanding of Mr. Smith's psychological state upon hearing Mr. Guerrero's words would be extremely probative of Mr. Smith's intent to assault anyone. This is so because not only could the comment about having killed Smith's son been likely considered fighting words in and of itself, but Smith's reaction, especially given his post traumatic stress disorder, would likely have been viewed as a reasonable response and that he acted in self defense. Smith testified that he had acted in self defense and self defense jury instructions were given to the jury (R. 231 at 67; R. 186-187). Had the trial court undertaken even a brief analysis of the probative value of Dr. Beall's expert testimony, this would have been apparent.

In *Maestas*, the Supreme Court emphasized the importance of expert testimony to a jury's fact finding task. The Court found that the trial court had abused its discretion when it did not allow expert testimony regarding eyewitness reliability because "the jury's consideration of guilt or innocence will depend on the weight that they give to [eyewitness] testimony, including how accurate they view this testimony to be. Thus ... offering an expert's testimony regarding the reliability of the eyewitness testimony in this case is particularly crucial for the fact finder." *Maestas*, 63 P.3d at 626. Expert testimony is admitted specifically to "assist the trier of fact to understand the evidence." Utah Evidence Rule 702.

It was an abuse of discretion for the trial court to view Dr. Beall's expert testimony, on its face, as mere speculation. When Smith attempted to introduce Dr. Beall as an expert witness, the trial court summarily dismissed Dr. Beall's expected testimony,


stating that “I don’t know that it’s the type of thing where medical testimony could be anything more than pure speculation unless there’s some foundation that hasn’t been proffered.” R. 231 at 138. Although the trial court complained about a lack of foundation, it did not allow Dr. Beall to provide any foundation for his expertise. The trial court did not ask Dr. Beall about his prior training, his current expertise, or his interactions with Smith.

Furthermore, the jury, and not the trial judge, is designated as the trier of fact. Smith’s jury should have been allowed to hear Dr. Beall’s qualifications; upon considering the foundation upon which Dr. Beall could testify regarding Smith’s psychological problems related to his dead son, the jury would then be empowered to come to its own conclusion about Smith’s state of mind and the reasonableness of his response especially in relation to Smith’s self defense claim. However, because the jury was unable to hear from an independent source the severe emotional trauma that Smith may have suffered when he heard disparaging things about his dead son, the jury had no way to truly gauge what special role Mr. Guerrero’s words played in encouraging, escalating, or causing Smith’s actions that night and the reasonableness of Smith’s reactions.

### **CONCLUSION AND PRECISE RELIEF SOUGHT**

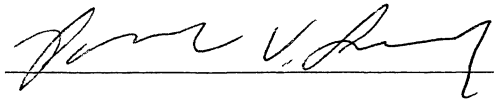
For the foregoing reasons, Smith asks this Court to reverse his conviction for assault, a Class B Misdemeanor, and grant a new trial.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of June, 2007.

  
Patrick V. Lindsay  
Counsel for Appellant

**CERTIFICATE OF MAILING**

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief of Appellant to Josh Player, Salt Lake County Deputy Attorney at 111 E Brouadway Ste 400 Salt Lake City, Utah 84111-5232, this 15<sup>th</sup> day of June, 2007.

  
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## **ADDENDA**

**Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.**

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

**ADVISORY COMMITTEE NOTE**

The text of this rule is Rule 402, Uniform Rules of Evidence (1974) except that prior to the word "statute" the words "Constitution of the United States" have been added.

**Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

**ADVISORY COMMITTEE NOTE**

This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that "surprise" is not included as a basis for exclusion of relevant evidence. The change in language is not one of substance, since "surprise" would be within the concept of "unfair prejudice" as contained in Rule 403. See also Advisory Committee Note to Federal Rule 403 indicating that a continuance in most instances would be a more appropriate method of dealing with "surprise." See also *Smith v. Estelle*, 445 F. Supp. 647 (N.D. Tex. 1977) (surprise use of psychiatric testimony in capital case ruled prejudicial and violation of due process). See the following Utah cases to the same effect. *Terry v. Zions Coop. Mercantile Inst.*, 605 P.2d 314 (Utah 1979); *State v. Johns*, 615 P.2d 1260 (Utah 1980); *Reiser v. Lohner*, 641 P.2d 93 (Utah 1982).

**Rule 702. Testimony by experts.**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

**ADVISORY COMMITTEE NOTE**

This rule is the federal rule, verbatim. Rule 56(2), Utah Rules of Evidence (1971), was substantially the same.



Instruction 42

A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force. However, that person is justified in using force intended or likely to cause death or serious bodily injury only if he or she reasonably believes that force is necessary to prevent death or serious bodily injury to himself or a third person as a result of the other's imminent use of unlawful force, or to prevent the commission of a forcible felony.

A person is not justified in using force as described above if he:

(a) initially provokes the use of force against himself with the intent to use force as an excuse to inflict bodily harm upon the assailant;

(b) is attempting to commit, committing or fleeing after the commission or attempted commission of a felony; or

( c ) was the aggressor or was engaged in a combat by agreement, unless he withdraws from the encounter and effectively communicates to the other person his intent to do so and, notwithstanding, the other person continues or threatens to continue the use of unlawful force.

A person does not have a duty to retreat from the force or threatened force in a place where that person has lawfully entered or remained unless he was the aggressor or was engaged in combat by agreement.

For the purpose of determining imminence or reasonableness you may consider, but are not limited to, any of the following factors:

- (a) nature of the danger;
- (b) the immediacy of the danger;
- (c) the probability that the unlawful force would result in death or serious bodily injury; and
- (d) the other's prior violent acts or violent propensities;

If the prosecution proves beyond a reasonable doubt that the defendant's use of force is not justified self-defense and proved each and every element of the charged offense then you must find the defendant guilty. On the other hand, if you find that the defendant's use of force is justified self-defense, then you must find him not guilty.